

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ROGER BIRDBEAR, et al.,)

Plaintiffs,)

vs.) Case No. 16-75L

THE UNITED STATES OF AMERICA,)

Defendant.)

Suite 705

Howard T. Markey National Courts Building

717 Madison Place, N.W.

Washington, D.C.

Wednesday, June 28, 2017

2:00 p.m.

Telephonic Status Conference

BEFORE: THE HONORABLE ELAINE D. KAPLAN

Transcribed by: George Quade, CERT

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6/28/2017

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1 APPEARANCES (Continued):

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24 ALSO PRESENT: Holly Clement, Department of Interior

25

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1 P R O C E E D I N G S

2 - - - - -

3 (Proceedings called to order at 2:00 p.m.)

4 THE COURT: Good afternoon, everyone. This is
5 Birdbear v. The United States, Number 16-75. And we're
6 going to have a hearing or a conference on two motions to
7 quash subpoenas. And so let me just take a roll call and
8 get everyone to give their appearance for the record.

9 First starting with the Plaintiff?

10 MR. SMITH: Yes, Your Honor. This is David
11 Smith. I believe Mr. Dustin Greene is also on the line.

12 THE COURT: Okay.

13 MR. GREENE: I am, Your Honor.

14 THE COURT: Okay. And for EOG?

15 MR. THOMPSON: Yes, ma'am. This is Robert
16 Thompson.

17 THE COURT: Robert Thompson.

18 And for Whiting?

19 MR. TOOLEY: Good afternoon, Your Honor. Keith
20 Tooley and Jens Jensen for Whiting Resources Corporation.

21 THE COURT: Keith Tooley?

22 MR. TOOLEY: Yes.

23 THE COURT: Okay. And for the Government?

24 MS. SCHWARZ: Good afternoon, Your Honor. This
25 is Jody Schwarz. Also present with me is Dedra Curteman,

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1 who is an attorney with the Department of Justice, and
2 Holly Clement, who is with the Solicitor's Office,
3 Department of the Interior.

4 THE COURT: Okay. Well, I've got two motions
5 to quash the subpoena in front of me, and I've looked at
6 the motions and the responses. I looked at the subpoena.
7 And it appears to me that the documents that the
8 Plaintiff is seeking -- Plaintiffs are seeking are
9 certainly relevant to the case.

10 It appears to me that the major issue here is
11 one of burden to the third parties from producing the
12 documents that the Plaintiffs are seeking. And I think
13 the burden argument appears to fall into two general
14 categories. First, that the Plaintiffs could get at
15 least some of the documents from the Government or from
16 public sources, and then second, in any event, it's
17 going to be very time-consuming and burdensome for the
18 EOG or Whiting to produce the documents that were
19 requested.

20 So I want to -- I know there's also some
21 confidentiality issues, but I feel like that can be
22 addressed through a protective order. So I want to focus
23 our discussion on the burden right now.

24 And so, Mr. Thompson, for EOG, how -- how does
25 EOG store these records? I assume -- are they stored

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1 electronically?

2 MR. THOMPSON: Portions of EOG's records are
3 stored electronically, Your Honor. Portions of them are
4 not. And I can't actually speak to how that search would
5 occur through the electronic documents. I know that many
6 of these documents are identified by lease number or CA
7 number, not track number --

8 THE COURT: Okay.

9 MR. THOMPSON: -- which are referenced in the
10 Plaintiff's complaint.

11 THE COURT: Okay. Let me stop -- let me stop
12 you right there and let me ask Plaintiffs or the
13 Government if there's a way to provide EOG and possibly
14 Whiting, if it needs it as well, with an identification
15 of what lease numbers apply to each tract. Mr. Smith?

16 MR. SMITH: Yes, we can provide lease numbers.
17 And, in fact, I think that has already been provided. We
18 provided copies of the leases.

19 THE COURT: Okay.

20 MR. SMITH: They should have that information.

21 THE COURT: Okay. So what difference does it
22 make that you then keep it by lease number, Mr. Thompson?

23 MR. THOMPSON: That would not, Your Honor. I
24 think the issue here with regard to if we're speaking to
25 burden is the scope of the subpoena. The subpoena as

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1 originally issued applies to the entire Fort Berthold
2 Indian Reservation and also the entire State of North
3 Dakota.

4 THE COURT: Well, I think there's at least
5 -- there's maybe one document request that applies to
6 the entire state of North Dakota, but most of the
7 requests seem to be applicable only to the particular
8 tracts of land on which there are leases. And am I
9 correct that --

10 MR. THOMPSON: I would beg to disagree, Your
11 Honor.

12 THE COURT: You don't have to beg.

13 MR. THOMPSON: The substantial request applied
14 to the entire Fort Berthold Indian Reservation.

15 THE COURT: Okay.

16 MR. THOMPSON: And the Plaintiffs made an
17 effort, I believe, to try to pull back from that by
18 seeking information in a three-mile radius --

19 THE COURT: Right --

20 MR. THOMPSON: -- of the tracts. But, Your
21 Honor, that covers 171 wells, 31,725 acres, and is not
22 tied -- any property within three miles of the
23 Plaintiff's six tracts which total about, I believe,
24 1,800 acres.

25 THE COURT: So there are six --

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1 MR. THOMPSON: So when we're talking about the
2 Plaintiff's tract --

3 THE COURT: So we're talking about just six
4 tracts with respect to EOG? Six tracts? And everything
5 within a three-mile radius?

6 MR. THOMPSON: Yes, ma'am. And that's the
7 31,725 acres and 171 wells.

8 THE COURT: Well, that's a lot of acres. But I
9 don't know if that makes it any more burdensome --
10 terribly burdensome that there's a lot of acres. I think
11 the Plaintiffs have supplied a reason why they need the
12 information about the leases within three miles. Now, I
13 understand when the subpoena was first issued, we had a
14 little less specificity. But it seems as though the
15 Plaintiffs have made an effort to narrow the subpoena and
16 to make it less burdensome for the -- for EOG and for the
17 other -- for the other companies.

18 So I guess -- my thought is with respect to
19 the information, the documents, that can be obtained
20 from the Government or from public sources, I was
21 trying to think about how to address that. The only
22 thing I could think of was to see if the Plaintiffs
23 could give EOG and Whiting a list of the documents
24 that they've been provided by the Government in
25 discovery. And it could list the documents by title

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1 or description and identify the number of pages in each
2 document so you wouldn't be producing anything that was
3 duplicative.

4 But I'm not sure if that's really going to help
5 you very much, EOG or Whiting, because you'd still have
6 to look at the documents and look in the files. Am I
7 right about that?

8 MR. THOMPSON: You are correct, Your Honor.

9 THE COURT: But I don't know how to solve that
10 problem because I think everyone would agree, probably
11 the Government reluctantly, that the Department of the
12 Interior's records are not in terribly good shape. And
13 so I don't think -- yes?

14 MS. SCHWARZ: Yes, Your Honor. I don't mean to
15 interrupt --

16 THE COURT: Sure, that's okay.

17 MS. SCHWARZ: -- but we would 100 percent
18 disagree with that statement.

19 THE COURT: Okay.

20 MS. SCHWARZ: The records are very good. It's
21 the fact they're voluminous and it takes time to copy,
22 but the agency has been very diligent in maintaining the
23 records. And, you know, even past problems that
24 Plaintiff has alluded to in previous conferences simply
25 are inapplicable to this case in that the documents that

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1 Plaintiff had requested (inaudible) has been producing
2 them in a timely manner, and they, in fact, exist. And
3 we would say that there's no record problems on our end.

4 THE COURT: Mm-hmm, okay.

5 Mr. Smith, is there any reason why the -- we
6 would require the third parties to produce to you
7 documents that you already have because they've been
8 produced by the Government?

9 MR. SMITH: Your Honor, respectfully we have
10 not received that many -- or I'll rephrase it. We
11 received documents from the Government, but, you know,
12 we're halfway through the discovery period and just
13 immediately before this hearing we received the first
14 production records from our own properties. We've
15 received almost nothing from any of the adjacent
16 properties.

17 It's coming in at an extremely slow pace and
18 much of the information we need to perform a drainage
19 analysis is simply not there. And, you know, with
20 respect to the records -- and I don't want to get into
21 an argument about the quality of the records, but one
22 of the reasons that Mr. Birdbear and the Birdbear
23 family filed this action was because of a discrepancy
24 between what their royalties were and what the Government
25 was saying the production was on their land and what --

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1 what was being reported by the operators. And they
2 actually hired a company to try to sift through that, and
3 there was as much as maybe 20 percent or more
4 discrepancy.

5 So there is a discrepancy on production between
6 the various sources, and the only way to get down to that
7 is to get to the source of the information, which is the
8 operators.

9 THE COURT: And, Mr. Smith -- not Mr. Smith.
10 Yes, Mr. Smith. I assume you've received a number of
11 documents from the Government so far that are the same
12 documents that you're requesting in the subpoena. Am I
13 correct? At least some documents.

14 MR. SMITH: Yeah. I mean, particularly with
15 respect to the first request, which is copies of leases
16 and things like that, we've received that.

17 THE COURT: Okay. So you don't need that
18 anymore, right?

19 MR. SMITH: They don't need that anymore.

20 THE COURT: Okay. And are there other
21 categories of document requests where you're requesting
22 documents from -- that theoretically the Department of
23 Interior should have where you've already received the
24 documents?

25 MR. SMITH: You know, honestly, I looked

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1 through this request in advance of the hearing --

2 THE COURT: Mm-hmm.

3 MR. SMITH: -- and, you know, perhaps we'll get
4 to that sometime. But things like e-mails with EOG or e-
5 mails with Whiting, you'd think the Government would
6 have, but we've never received any of those.

7 THE COURT: Did you -- you requested those?

8 MR. SMITH: Yeah, yeah.

9 THE COURT: And, Ms. Schwarz, what's up with
10 those?

11 MS. SCHWARZ: As Your Honor can see from the
12 court docket, the parties just recently finished up our
13 EFI order governing the production of electronic
14 information.

15 THE COURT: Right.

16 MS. SCHWARZ: So with that, you know, we have
17 search terms, custodians that we've agreed upon with the
18 Plaintiffs. And so right now we're in the process of
19 pressing all that data if we haven't provided it
20 previously because we were in the process of negotiating
21 the search terms and those custodians.

22 THE COURT: Mm-hmm.

23 MS. SCHWARZ: And then the documents that
24 they received are the documents that they've requested.
25 In addition to drainage, Plaintiffs have sought several

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1 other accounts related to royalties, related to
2 readings, related to takings, and Plaintiffs have
3 requested documents or interrogatories regarding all
4 their claims.

5 We can't segregate our discovery. We have to
6 respond in course as documents come up. We've been
7 giving a rolling production of documents to Plaintiff.
8 We've been pretty much providing data to them every week.
9 I don't think we did it the past week. I know we served
10 discovery on them. And so to say that it's going at a
11 very slow pace that we're halfway through I think does
12 disservice to the actual process that is going on and
13 what the Government has produced to them.

14 THE COURT: Okay.

15 MR. SMITH: I don't want to get in a dispute
16 with the Government during this hearing. There's no need
17 for that.

18 THE COURT: Okay.

19 MR. SMITH: But, you know, I'm going through
20 here and there are not many documents that were requested
21 that we've actually received from the Government.

22 THE COURT: Well, all right. But it sounds
23 like that's not necessarily because they've lost the
24 documents, but they're in the process of producing them
25 and they expect to produce whatever you've requested. Am

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1 I correct about that?

2 MR. SMITH: That's correct.

3 THE COURT: Okay.

4 MR. SMITH: So the extent they're requesting --
5 we've requested electronic communications with the
6 Government, you know, I'm willing to -- I have no problem
7 waiting to see what -- make sure the Government provides
8 them. But it seems like when they're searching for
9 records they're going to come up with those anyway.

10 THE COURT: Mm-hmm. Well, it might be that
11 there's some categories of documents that you're
12 requesting in here that we can wait on and give the
13 Government time -- give the Government time to produce
14 the documents for you so that you don't have to make a
15 request from the third parties. That's a possibility.
16 And I'm starting to think that might be a good idea.

17 But let me ask about the -- most of the
18 categories, or many of the categories of information in
19 here, are not -- don't involve communications with the
20 Government or things that the Government should be able
21 to produce in discovery, Mr. Thompson. So what is your
22 objection as to those other categories of documents?
23 It's just the general, it's going to be -- it's
24 burdensome and a lot of property and all that.

25 MR. THOMPSON: I think there's a couple of

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1 responses to your inquiry, Your Honor.

2 THE COURT: Okay.

3 MR. THOMPSON: I would refer the Court to the
4 Holte affidavit, Docket Number 45-2.

5 THE COURT: Right.

6 MR. SMITH: In which Mr. Holte identified 26 of
7 the 33 requests, 20 of the requests go to documents in
8 the Government's possession. And there are another set
9 of --

10 THE COURT: Well, I actually -- when we went
11 through the documents -- and I don't think I found -- I
12 mean, think -- I didn't find 20. I mean, I think we
13 found some requests that maybe some of the documents
14 would be in the Government's possession, but other's
15 wouldn't. The request covered more -- both things that
16 would be in the Government's possession and things that
17 would not. But in any event, I'm sorry to interrupt you.
18 Go ahead.

19 MR. THOMPSON: No, you're fine. And there are
20 a number of requests that are, of course, available on
21 the NDIT website as opposed to requiring the EOG to
22 expend its time and resources to identify documents that
23 are available on the NDIT website. But in addition,
24 because we were just speaking to e-mails, the requests at
25 this juncture also seek not only communications between

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1 EOG and the Government but EOG's internal communications,
2 internal e-mails, internal studies. That could be --
3 that would be just an inordinate amount of work to
4 determine what internal e-mails in one company of 3,000
5 or more people have anything to do with the Plaintiffs'
6 tracts.

7 THE COURT: Well, couldn't you agree on search
8 terms with the Plaintiff? I mean, why does -- it's just
9 pressing buttons, right, and then looking through the
10 documents, obviously. But, I mean, this is always true
11 with electronic discovery.

12 MR. THOMPSON: And I cannot speak, Your Honor,
13 to EOG's capabilities within that regard. You may well
14 be very correct -- may well be correct. I'm just
15 ignorant in that regard.

16 THE COURT: Okay. Well, I mean, if you're
17 saying it's burdensome, I think we have to be able to
18 know if it's any more than just coming up with search
19 terms and pressing buttons. But, okay. Mr. -- I'm
20 sorry, the attorney for Whiting, did you have anything
21 you wanted to add?

22 MR. TOOLEY: Yes, I do, Your Honor. Thank
23 you very much. In response to your earlier question,
24 there is a large amount of data that is electronically
25 stored. There's also hard copy data. My client is the

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1 successor to another company, Kodiak, that's actually
2 been acquired and has a new name, but there are some
3 complexities given the lack of any time constraint
4 regarding gathering up these documents even on the
5 electronic basis.

6 The other thing that really struck me about the
7 subpoena is the extreme breadth of what has been
8 requested. In many ways it requests that the company re-
9 create 11 years of all the business that it's done, down
10 to the details of mud logs and casing and --

11 THE COURT: But it's only as to the tracts of
12 land on which the Plaintiffs have leases. Right?

13 MR. TOOLEY: Right.

14 THE COURT: Not all the business it's done.

15 MR. TOOLEY: And the adjacent tracts, too --

16 THE COURT: Right.

17 MR. TOOLEY: -- that were originally put to us.
18 It was very broad and we've been trying to work with
19 Plaintiff's counsel to narrow that down so it's at least
20 manageable. But even when it's manageable, this task is
21 going to be enormous. And I guess my observation is I
22 think it was a very wise suggestion to have some lists or
23 categories of documents that the Government is providing
24 so that the -- these 12 or 13 companies who are involved
25 in the suit don't have to duplicate what's already being

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1 done.

2 THE COURT: Okay.

3 MR. TOOLEY: So that's a big part of our
4 concern. I asked my client what's the manhours required
5 for this, and it would be 1,900 hours as the subpoena was
6 originally proposed. That's, again, an estimate, but
7 it's an enormous amount of time, energy, expense, and I
8 don't think there's much purpose --

9 THE COURT: Could you hold on a second? Is
10 someone -- did someone just sign on?

11 MR. GREENE: Yes, Your Honor. This is Dustin
12 Greene for the Plaintiff. Sorry, I dropped the call and
13 had to --

14 THE COURT: Oh, okay.

15 Okay, go ahead. I'm sorry. Mr. Tooley, I'm
16 sorry I interrupted you. Go ahead.

17 MR. TOOLEY: So there's a lot of other
18 companies in our -- our similar shoes. And just the
19 personnel hours that would have to be devoted to this are
20 enormous.

21 THE COURT: Well, are the records -- aren't the
22 records kept electronically?

23 MR. TOOLEY: Not all records are
24 electronically. In particular, some of them, the
25 electronic format is another issue. When you get down to

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1 some of the technical engineering data that they're
2 asking about, it's a whole different process to do those
3 searches. I've had a number of other cases where that
4 can be a real challenge.

5 THE COURT: Mm-hmm.

6 MR. TOOLEY: And then, of course, the item that
7 Mr. Thompson already addressed, the internal
8 communications, makes it difficult as well. That
9 requires, you know, a privilege review on our end, and
10 that's also time-consuming. So to the extent we can get
11 some sidebars on this and figure out what Plaintiffs are
12 receiving through the Government anyway, that would be
13 very much appreciated by Whiting and I think the other
14 subpoena recipient.

15 THE COURT: Mr. Smith, do you have any response
16 to that?

17 MR. SMITH: Your Honor, our response to that is
18 simply this: The burden is on them in objecting to and
19 moving to quash the subpoena to come up with specific and
20 compelling truth by affidavit or other evidence of the
21 burden.

22 THE COURT: Mm-hmm.

23 MR. SMITH: And simply saying, hey, this is
24 going to take a lot of time and we may not all be
25 electronic is not that -- the evidence that's required to

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1 quash the subpoena.

2 THE COURT: Okay.

3 MR. SMITH: And, you know, this is true of any
4 business. I mean, this is a company that has leases on
5 Plaintiffs' properties about 1,000 acres. That's
6 substantial. And this is -- you know, I'll just, you
7 know, point out that this is not -- this is a company
8 that's operated on our client's property since 2007,
9 about ten years. And the information we are requesting
10 is something that they are required by law to maintain.
11 It's required in the lease. I've noticed it in paragraph
12 3(d) that they're required to maintain or to protect the
13 property from drainage.

14 By regulation, they need, if necessary, to
15 protect the property from drainage, and that's 25 CFR
16 211.47(b). And then under 43 CFR 3162.2, they have to
17 make necessary calculations to determine the amount of
18 drainage. This is something they had an ongoing duty to
19 do over the past ten years.

20 THE COURT: Mm-hmm.

21 MR. SMITH: And, you know, it looks from the
22 documents like, you know, perhaps the Government was
23 relying on them to do that. And the Government said --
24 and the operator said we don't believe there's any
25 drainage in the Bakken. And so whatever the case,

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1 whether they did or not, this is some data they should
2 have. It should be available. If they didn't perform
3 it, then provide us the data and we can do it. But the
4 data should have been available and should be available
5 in a reasonable format.

6 MR. TOOLEY: Your Honor, Keith Tooley if I
7 may?

8 THE COURT: Yeah.

9 MR. TOOLEY: There's an extreme amount of
10 reporting required to the Federal Government and to the
11 State of North Dakota, depending on where the lands are
12 located. I'm wondering whether the Plaintiffs have done
13 that search of all of the available public records rather
14 than shifting that burden onto the subpoena recipient.

15 MR. SMITH: And, Your Honor, this is David
16 Smith.

17 THE COURT: Yeah.

18 MR. SMITH: The answer to that question is
19 yes. And as you see from the affidavit of our expert
20 witness at the Colorado School of Mines, he says the
21 information that he's reviewed at the State of North
22 Carolina is not sufficient. And, further, if you look at
23 the affidavit of Mr. Anstey, a lot of the information
24 that we are requesting is identical to the pressure
25 information and things like that that are identical to

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1 the information that the Government was requesting of the
2 operators, and they say, hey, this is the information you
3 need to do your drainage analysis. We can't see that
4 they ever got that information because it's not been
5 produced to us.

6 THE COURT: Mm-hmm.

7 MR. SMITH: So that -- this is nothing unique.

8 THE COURT: Mm-hmm.

9 MR. SMITH: It's something that they are
10 required to do to protect the properties in the Bakken.
11 That -- it's something the operators do every day. They
12 maintain pressure records, they maintain choke readings
13 to make sure that these properties are protected.

14 So we know that the Government was looking at
15 this information and expected them to have it. It's not
16 been produced and it doesn't look like -- and when we
17 look at the Government's records, those pockets are
18 empty. You know, there's no data in them. So it doesn't
19 appear that it was provided by them.

20 THE COURT: Okay.

21 MR. SMITH: So all the information we have
22 right now, in fact, the Government admitted in the
23 discovery responses they don't have that information.

24 THE COURT: Okay.

25 MR. SMITH: So all we can look to are the

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1 operators.

2 THE COURT: Okay. Let me ask another question.
3 Mr. Smith had circulated a draft protective order. Did
4 you have a chance to look at that, Mr. Thompson?

5 MR. THOMPSON: I have, Your Honor, and I'd
6 actually like to speak to that and then speak to some --
7 the past two conversations.

8 The protective order does not limit the
9 Plaintiffs' ability to use the records supplied by the
10 some 11 companies in other proceedings outside of this
11 proceeding, nor have I -- although I have seen e-mails or
12 maybe a letter in that regard. The Plaintiff in this
13 action acts as a land consultant for lease negotiations.
14 So there's certainly information they have sought that
15 would be of use to anyone who is negotiating with an oil
16 and gas company for a lease from theirs or other person's
17 property.

18 So the protective order does not -- does not
19 provide the sorts of protection to EOG that most
20 protective orders would, and if there were a protective
21 order then it would have to say that any of this
22 information cannot be used outside of this litigation.

23 I would also like to come back to a point that
24 Mr. -- a topic Mr. Tooley and Mr. Smith were addressing,
25 and that is, Your Honor, we still have a very broad

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1 subpoena as to lands and acreage. As Mr. Smith
2 suggested, the Plaintiffs have about 1,000 acres under
3 lease. We have not had that subpoena limited as to its
4 parameters. And even the offer to limit that to a three-
5 mile radius covers some 38,000 acres and hundreds of
6 wells.

7 We're not just speaking to the Plaintiffs'
8 properties here with respect to drainage or any other
9 issue. We're talking about a substantially larger
10 universe, Your Honor.

11 THE COURT: Okay.

12 All right, Mr. Tooley, do you have anything
13 else you wanted to add? And then I'm going to let Mr.
14 Smith have the last word. And I assume, Ms. Schwarz, you
15 don't want to get involved with this.

16 MS. SCHWARZ: No, Your Honor.

17 THE COURT: Okay.

18 Mr. Tooley?

19 MR. TOOLEY: I would echo what Mr. Thompson
20 just described. There's likewise not a temporal limit,
21 which was our concern that the geographic scope is
22 enormous. This goes back 10 or 11 years in time. It
23 makes the task -- you know, it's a big mountain to climb.

24 THE COURT: Okay.

25 Mr. Smith? Is there no temporal limit on the

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1 records that you're seeking?

2 MR. SMITH: We actually hadn't -- if you look
3 back through the correspondence, we actually had an
4 agreement with Whiting at one time, January 2006. The
5 leases with Whiting commenced in 2007. The leases with
6 EOG are at some point in 2008.

7 THE COURT: So that's the temporal limit?

8 MR. SMITH: So we had an understanding, the
9 same agreement we had with the Government, that discovery
10 would begin January 1, 2006.

11 THE COURT: Okay. Is there any final thing you
12 wanted to add, Mr. Smith?

13 MR. SMITH: I don't -- I don't believe so, Your
14 Honor.

15 THE COURT: Okay. Well, I'm going to think
16 about this a little bit more. I'm not going to quash the
17 subpoena, although I think I'm probably going to limit it
18 in certain respects.

19 And I'm going to ask the parties to work
20 together on a protective order that meets everybody's
21 needs. And then we'll just take it from there. So I
22 should be issuing an order in the next couple of days.

23 And have a nice 4th of July. Thank you.

24 MR. THOMPSON: Thank you, Your Honor.

25 MR. SMITH: Thank you.

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1 MS. SCHWARZ: Thank you.

2 THE COURT: Bye.

3 (Whereupon, at 2:28 p.m., the conference was
4 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, George Quade, court-approved reporter,
4 certify that the foregoing is a correct transcript from
5 the official electronic sound recording of the
6 proceedings in the above-titled matter.

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10 DATE: 12/12/2017

s/George Quade

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GEORGE QUADE, CERT

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